IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted]38

JAMES G. GLOVER et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

Of Respondent Brotherhood of Railway Carmen of America in Opposition.

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Cases Cited.

Statute Cited.

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BRIEF

Of Respondent Brotherhood of Railway Carmen of America in Opposition.

Respondent Brotherhood files this brief in opposition to the petition for certiorari filed by James G. Glover, et al. to review a judgment of the Court of Appeals for the Fifth Circuit rendered on December 5, 1967.

OPINIONS BELOW.

The opinions of the District Court appear at pages 65 and 74 of the Petition (57 LC, ¶ 9097). The opinion of the Court of Appeals appears at page 51 of the Petition and is reported at ... F. 2d.... (57 LC, ¶ 9098).

QUESTIONS PRESENTED.

The question is:

Did the Courts below correctly decide that a mixed group of railroad carmen helpers (white and Negro) could not sue upon a contract claim for promotion to carmen, absent exhaustion or attempted exhaustion of available contractual and administrative remedies?

COUNTER-STATEMENT.

Petitioners elected not to attempt (1) to utilize appellate procedures available within the union, or (2) to proceed before the National Railroad Adjustment Board (referred to herein as "Board").

That Board is the administrative agency designated by Congress to construe and interpret collective bargaining contracts in the railroad industry. It has the concomitant duty to pass upon employee claims and grievances arising under such contracts.

Petitioners imply that the Board is beholden to these parties.[1] The petition states:

> "To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the instant circumstances where the Company and the Brotherhood are working 'hand-in-glove.'" Petition, p. 70.

The statement is incorrect.

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[1] Congress, of course, has fixed the composition of the Board, 45 U. S. C. A., Sec. 151, *et seq.*, and that matter is not appropriately in issue.

In fact, the docket of the Second Division of the Board which has jurisdiction over claims of railroad shop craft employees including carmen, is current. Claims before that Division may be handled to a conclusion in a matter of months.[2] In response to a question during oral argument, the Court of Appeals below was so advised.

It is of more than passing interest that the Circuit Court of Appeals below has borne a major portion of the burden of judicially exorcising racial discrimination during the past two decades. And, particularly, the panel which heard this case was presided over by perhaps one of the most distinguished of jurists who has participated in that great work.

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[2] Also, the docket of the First Division of the Board, alluded to by this Court in **Walker v. Southern Railway Company**, 385 U. S. 196, 198, is almost current. This improvement is attributable to the adoption of the 1966 Amendments to Sec. 3 Second of the Railway Labor Act, providing for the creation of special boards of adjustment. 45 U. S. C. A., § 151, *et seq.*, § 153 Second.

ARGUMENT.

I. The Writ Should Be Denied.

(a) The Decision Below Is in Accord With Applicable Decisions of This Court.

Petitioners would have this Court extend to them the umbrella of the Court's concern for racial minorities.

But this is a group of white and Negro employees.

Petitioners do not attack the collective bargaining contract as racially discriminatory or as otherwise invalid. On the contrary, petitioners only assert rights under the contract, rights which they say have been denied to them. It is permission to promote "to 'carman' as called for by the contract," that they seek (Petition, p. 4).

Vindication of any such contract rights is the precise business which is the Board's exclusively.[3]

(b) The National Railroad Adjustment Board Has Exclusive Jurisdiction Over This Dispute Which Involves an Attempt by Employees to Enforce Rights Allegedly Guaranteed by an Applicable Collective Bargaining Agreement.

Congress, by 45 U. S. C. A., § 151, *et seq.*, provided the tribunal for settling disputes arising out of the interpre-

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[3] If petitioners are saying, as they seem to imply, that as individual railroad employees they cannot process their own contractual grievances before the Board, they are mistaken. They have the right to present their grievances to the Board, whether or not their union representative, assuming it had received a request to do so, acts to that end. See **McElroy v. Terminal Railroad Assn.**, ... F. 2d ..., ..., 67 LRRM 2681, 2684 (7th Cir. Feb. 28, 1968), citing **Elgin, Joliet and Eastern Ry. v. Burley**, 325 U. S. 711; **Rose v. Great No. Ry. Co.**, 268 F. 2d 674 (5th Cir. 1959); **Colbert v. Brotherhood of Railroad Trainmen**, 206 F. 2d 9 (9th Cir. 1953), **cert. denied** 346 U. S. 931; **Davis v. Southern Ry.**, 256 Ala. 202, 54 So. 2d 308; **Hippensteel v. System Federation 9, etc.**, 337 Mich. 251, 59 N. W. 2d 278.

tation or application of agreements concerning rates of pay, rules, or working conditions of employees in the railroad industry.

Initially, this Court in **Moore v. Illinois Central R. R.**, 312 U. S. 530 (1941), held that the creation of this Board did not prevent the courts from exercising their traditional jurisdiction over an action by an employee for damages for wrongful discharge in violation of his contract of employment.

Subsequently, in the companion cases of **Slocum v. Delaware, L. & W. R. R.**, 339 U. S. 239 (1950), and **Order of Ry. Conductors of America v. Southern Ry.**, 339 U. S. 255 (1950), the decision in **Moore** was limited to an action for wrongful discharge (where the employee chose to accept the discharge as final and did not seek to attack its validity before the Board). Jurisdiction of the Board over questions of interpreting and applying collective agreements (which "involve questions of future relations between the Railroad and its other employees," 339 U. S. at 580) was held to be **exclusive.**

Petitioners would avoid the above principle by alleging that the collective agreement here is being misapplied as to them because of "racial" discrimination. But, whatever the complaint below may be said to contain, it hardly describes any racial discrimination, since it alleges that petitioners are both Negro and white.

Even if it be assumed that the allegations in the complaint raise a question of racial discrimination, it is significant that those cases which have permitted suit in court without attempted redress before the Board, such as **Steele v. Louisville & Nashville R. R.**, 323 U. S. 192 (1944), upon which petitioners rely, involve a denial of the validity of a collective agreement, not interpretation and application of that agreement. Here, petitioners seek

to enforce rights under the collective agreement, not to set aside this agreement as in, for example, **Steele**, *supra*.

This distinction was explained in **Brotherhood of Railroad Trainmen v. Howard**, 343 U. S. 768 (1952): "The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in **Slocum v. Delaware, L. & W. R. R. Co.**, 339 U. S. 239. This dispute involves the validity of the contract, not its meaning" 343 U. S. at 774.

See, also, **Tunstall v. Brotherhood of Locomotive F. & Enginemen**, 323 U. S. 210 (1944).

Petitioners also cite **Conley v. Gibson**, 355 U. S. 41 (1957). However, **Conley** was an action which sought not to enforce contractual rights against the employer under the collective agreement, but instead to impel the union to handle grievances for claims of Negroes (where it was shown that the union had processed grievances for white employees similarly situated). **Conley** thus involved a question of the failure on the part of the union to represent employees, as distinguished from the interpretation or application of economic benefits under the collective agreement as here.

(c) Exhaustion of Administrative Remedies Both Under the Collective Bargaining Agreement and the Constitution of the Brotherhood Is a Prerequisite to This Suit.

Exhaustion of remedies under the collective agreement or within the review procedures of the union organization is an accepted prerequisite to judicial relief. This general principle has been widely recognized by the lower Federal courts. It was recognized by this Court in **Republic Steel Corp. v. Maddox**, 379 U. S. 650 (1965):[4]

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[4] See also the decision by this Court, **Vaca v. Sipes**, 386 U. S. 171.

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must **attempt** use of the contract grievance procedure agreed upon by employer and union as the mode of redress. . . . And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."

379 U. S. at 652-53 (emphasis in text).[5]

CONCLUSION.

Petitioners seek judicial enforcement of rights allegedly guaranteed them under the collective agreement which exists between the Brotherhood and the railroad. Such a claim for relief exclusively rests within the province of the Board.

Petitioners also admit their failure to attempt utilization of the contractual grievance machinery or the internal remedies within the union organization. This failure to exhaust administrative remedies is likewise fatal to their claim.

The claim of petitioners was thus properly dismissed.

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[5] In **Walker v. Southern Railway Company**, 385 U. S. 196, 87 S. Ct. 365 (1966), this Court decided that **Maddox** did not overrule **Moore** and held that under the Railway Labor Act a discharged employee may (as in **Moore**) either pursue his administrative remedies or accept his discharge as final and immediately seek redress in court. The instant case of course does not involve a discharged employee. On the contrary, here a continuing relationship exists and these petitioners seek to have the collective agreement enforced for their benefit. Under such circumstances the clearly enunciated federal policy favoring exhaustion of administrative remedies is, it is submitted, applicable, unaffected by **Walker**.

For the reasons given, Brotherhood respectfully prays that certiorari be denied.

Respectfully submitted,

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Certificate of Service.

I hereby certify that I have served the foregoing by mailing, postage prepaid, a copy to William M. Acker, Jr., 6th floor, Title Building, Birmingham, Alabama 35203; Carl Isaacs, Woodward Building, Birmingham, Alabama 35203; Paul R. Moody, 300 Frisco Building, 906 Olive Street, St. Louis, Missouri; and Cabaniss, Johnston, Gardner & Clark, 900 First National Building, Birmingham, Alabama, this 28th day of March, 1968.

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